Supreme Court, U.S.
FILED

09-839 NOV 5 - 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

NO. _____

In The
Supreme Court of the United States

SYBLE HOQD
AND TOM H. WHITESIDE,
Petitioners,

v.

EDWARD D. JONES & Co., L.P.
AND ROBBY ROGERS,
Respondents.

On Petition For A Writ of Certiorari To The Eighth Court Of Appeals of Texas

---

PETITION FOR WRIT OF CERTIORARI

TOM H. WHITESIDE
WHITESIDE LAW FIRM
P.O. Box 2825
Lubbock, Texas
79408-2825
(806) 687-9009
Counsel for Petitioners

QUESTIONS PRESENTED

In this age discrimination case, did the Eighth Court of Appeals of Texas violate Due Process by denying Plaintiff Hood a meaningful opportunity to be heard when the trial court put her to trial and hearing despite refusing her well-founded discovery requests? The questions are:

1. Did the Court of Appeals violate Due Process in affirming the trial court's refusal to allow Plaintiff discovery of statistical data and defendant's own "inclusion" department's analyses which violates the Plaintiff's right to statistical information in an age discrimination case under *McDonnell Douglas Corp.v. Green*, 411 U.S. 804, (1973), *Smith v. City of Jackson*, 544 U.S. 228, (2005), *Deloach v. Delchamps, Inc.*, 897 F.2d 215, (5th Cir. 1990) and *Quantum Chemical Corporation v. Toennies*, 47 S.W.3d 482, (Tex. 2001)?
2. Was the Court of Appeals' refusal to require the Trial Court to examine Defendant's

allegedly privileged documents *in camera* and dismiss sanctions against Whiteside a denial of Due Process? Can courts require evidence of "bad faith" or subjective intent to defraud to warrant sanctions and on the other refuse to examine withheld documents *in camera* which would show whether bad faith actually occurred?

PARTIES TO THE PROCEEDING

The Petitioners are Syble Hood and Tom Whiteside.

The Respondents are Edward D. Jones & Co., L.P. and Robby Rogers.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....ii

PARTIES TO THE PROCEEDING.....iv

TABLE OF AUTHORITIES.....vi

CASES.....vi

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES.....viii

OTHER AUTHORITIES.....viii

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS INVOLVED.....2

STATEMENT.....2

A. Discharge of Hood and Replacement by Scott.....2

B. Request for Statistical Data of Discrimination and Inclusion Department.....3

C. Inclusion Department and Pertinence of Statistical Information.....7

D. Rogers' Motion for Summary Judgment.....11

E. Hood's Motion for Sanctions.....20

F. Hood's Mandamus to the Court of Appeals and Texas Supreme Court.....28

G. Trial Court Order Denying Hood's Motion for Sanctions and Granting Jones' Motion for Sanctions and Hood's Objection.....29

H. Court of Appeals Decisions.....29

REASONS FOR GRANTING THE PETITION.....31

I. Recent Decisions of the El Paso Court of Appeals and the Texas Supreme Court highlight the dual system of justice that exists in Texas. 31

II. Funding for the Texas Supreme Court has led to preferential treatment for donors.....37

III. Caperton vs. A.T. Massey Coal, Inc., 556 US ___, 129 S.Ct. 2252 (2009) reaffirms that justice is not for sale. 40

CONCLUSION.....42

APPENDIX

January 3, 2007 109th District Court of Andrews County Texas Final Judgment.....App. A

March 22, 2007 Court of Appeals for the Eighth District of Texas Judgment.....App. B

March 22, 2007 Court of Appeals for the Eighth District of Texas Memorandum Opinion on Petition for Writ of Mandamus.....App. C

June 1, 2007 Supreme Court of Texas Order Denying Petition for Mandamus.....App. D

July 27, 2007 Supreme Court of Texas Order Denying Motion for Rehearing.....App. E

October 23, 2007 109th District Court of Andrews County Texas Order Denying Plaintiff's Motion for Relief under TRCP 13 and TRCP 166a(h).....App. F

January 29, 2009 Court of Appeals for the Eighth District of Texas Opinion (No. 08-07-00324)...App. G

January 29, 2009 Court of Appeals for the Eighth District of Texas Opinion (No. 08-07-00093)...App. H

March 4, 2009 Court of Appeals for the Eighth District of Texas Order Denying Motion for Rehearing (No. 08-07-00324).....App. I

March 4, 2009 Court of Appeals for the Eighth District of Texas Order Denying Motion for Rehearing (No. 08-07-00093).....App. J

June 12, 2009 Supreme Court of Texas Order Denying Petition for Review (No. 08-07-00324).....App. K

June 12, 2009 Supreme Court of Texas Order Denying Petition for Review (No. 08-07-00093).....App. L

August 7, 2009 Supreme Court of Texas Order Denying Motion for Rehearing (No. 08-07-00324).....App. M

August 7, 2009 Supreme Court of Texas Order Denying Motion for Rehearing (No. 08-07-00093).....App. N

Boyer v. Jones.....App. O

TABLE OF AUTHORITIES

CASES

Appleton v. Appleton,
76 S.W.3d 78 (Tex. App. –
Houston (14th Dist.) 2002).....22

Baker v. Welch,
735 S.W.2d 548 (Tex. App. –
Houston [1st Dist.] 1987, writ dism'd)...12, 30

Casas v. Wornick Co.,
818 S.W.2d 466 (Tex. App. –
Corpus Christi 1991, writ ref'd).....12

Cire v. Cummings,
134 S.W.3d 835 (Tex. 2004).....23

Deloach v. Delchamps, Inc.,
897 F.2d 815 (5th Cir. 1990).....ii, 6

Ford Motor Company v. Castillo,
279 S.W. 3d 656 (Tex 2009).....32, 34, 35, 36

Gonzalez v. Gutierrez,
694 S.W.2d 384 (Tex. App.–
San Antonio 1985, no writ.).....30

GTE Communications Systems Corp. v. Tanner,
856 S.W.2d 725 (Tex. 1993).....23

Hood v. Edward D. Jones & Co., L.P.,

2009 Tex.App. LEXIS 544,
(Tex.App. - El Paso, Jan. 29, 2009).....1

Hood v. Edward D. Jones & Co., L.P.,
2009 WL 202466
(Tex.App. -El Paso).....1

In re Small,
2009 WL 1620436 (Tex.App.–
El Paso).....32, 34

Joint Anti-Fascist Committee v. McGrath,
341 U.S. 123 (1951)
(Frankfurter, J., concurring).....41

Marathon Oil Co. v. Moye,
893 S.W.2d 585 (Tex.App.–
Dallas 1994, orig. proceeding).....32

Matthews v. Eldridge,
424 U.S. 319 (1976).....41

McDonnell Douglas Corp. v. Green,
411 U.S. 804 (1973).....ii

Mullins v. Raytheon Co.,
164 F.3rd 696 (1st Cir. 1999).....6

Peeples v. Hon. Fourth Supreme Judicial Dist.,
701 S.W.2d 635 (Tex. 1985)
(orig. proceeding).....32

Quantum Chemical Corporation v. Toennies,

47 S.W.3d 482 (Tex. 2001).....ii

Smith v. City of Jackson,

544 U.S. 228 (2005).....ii, 7

TransAmerican Nat. Gas Corp. v. Powell,

811 S.W.2d 913 (Tex. 1991).....22-23

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. XIV, § 1.....2

TEX. R. CIV. P. 192.3.....9, 10, 25, 27

TEX. R. CIV. 192.4.....9

TEX. R. CIV. 192.4 (b).....26

Tex.R.Civ.P. 193.3(a).....32

TEX.R.CIV.P. 193.3(c).....26

OTHER AUTHORITIES

A Decade of Watching and Waiting: The Texas Supreme Court in Review 2005-2006,

Texas Watch Foundation, March 2007.....38

Champagne, *The Selection and Retention of Judges in Texas,*

40 SWLJ 53, 84 (1986) 38

Column, *Texas Justice for Sale? Judge for Yourself,*

Houston Chronicle, Sept. 13, 1992,

Outlook at 2 38

Court Watch, *The Food Chain: Winners and Losers in the Texas Supreme Court 1995-99*, at Chart 1 (May 1999) 38

Editorial in Texas, *Contempt of Court*, New York Times, November 5, 1987, at A34 38

Editorial, *Texas Supreme Court Judges Should Disclose Votes. Senator Kirk Watson's Bill Would Reveal Justices' Votes on Petitions*, Austin American Statesmen, May 5, 2009...38

Interested Parties: Who Bankrolled Texas' High-Court Justices in 2008?, Texans for Public Justice, October 2009.....38

Leadership (2006), http://www.tortreform.com/leaders.....40

Line of Succession of Supreme Court of Texas Justices from 1945: The Modern Court (2009), http://www.supreme.courts.state.tx.us/court/sc-justices-1945-present-111406.pdf.....38

No End in Sight: Texas Supreme Court Maintains its Longstanding Tradition of Pro Defendant Bias 2006-2007, Texas Watch Foundation Annual Report,

August 27, 2008.....38

PAC for Texas Doctors Gives to Court Hopefuls,
Beaumont Enterprise, Oct. 14, 1988.....38-39

Quality of Justice: Texan Case Spotlights Question on Integrity of the Courts in Texas.
Wall Street Journal, November 4, 1987, at 1.....38

Shifting Sands for Consumers: Increased Control by Activists, Defection of Moderates Leaves Consumers Looking for Relief,
Texas Watch Foundation 2002-2003.....39

Shining a Light: The Texas Supreme Court's Annual Report 2007-2008,
Texas Watch Foundation, 2009.....39

Texans for Public Justice, *Courtroom Contributions Stain Supreme Court Campaigns*, (2008), http://info.tpj.org/reports/courtroom contributions/courtroomcontributions.pdf 39-40

Texans for Public Justice Funded By Trial Lawyers,
TLR Press Release, November 2, 2006.....40

Texas Watch Foundation, *Justice for Sale in Texas?,*
KHOU (Houston, Texas), May 13, 2008.....39

The Texas Supreme Court by the Numbers:

A Statistical Analysis of the Texas Supreme Court 2005-2006,
Texas Watch Foundation 2007.....39

OPINIONS BELOW

The opinions of the Eighth District Court of Appeals appear at Appendix G. and H. and are reported at *Hood v. Edward D. Jones & Co., L.P.*, 2009 Tex.App. LEXIS 544, (Tex.App. - El Paso, Jan. 29, 2009) and *Hood v. Edward D. Jones & Co., L.P.*, 2009 WL 202466 (Tex.App. -El Paso).

JURISDICTION

Pursuant to Rule 12.4, this writ seeks review of the judgments of the Eighth Court of Appeals of Texas. The Supreme Court of Texas denied the petitions for review on June 12, 2009. Copies of these denials appear at Appendix K. and L. Timely petitions for rehearing were thereafter denied on August 7, 2009, and copies of these orders denying rehearing appear at Appendix M. and N. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in relevant part

> No state shall . . . deprive any person of life, liberty, or property without due process of law.

U.S. Const. amend. XIV, § 1.

STATEMENT

A. Discharge of Hood and Replacement by Scott

On April 10, 1990 Hood began employment at Edward D. Jones & Co., L.P. On May 1, 1998 62-year-old Hood, a BOA (Branch Office Administrator), was discharged from employment with the Defendants, Jones and Rogers and replaced with 31-year-old Lyn Scott who testified at the trial:

> Q: And, after Ms. Hood left, May 1st, of '98, how long were you the only B.O.A. in the office if you can remember?
> A: God, that was nine years ago. I would say probably four or five months.
>
> Q: Did you assume any of the duties of Syble Hood after May 1st, of '98?
> A: Well, I was the only B.O.A. left in the office, so Robby had to pitch in and we both continued to run the office.

6 RR 555-556.

B. Request for Statistical Data of Discrimination and Inclusion Department

On April 5, 1999 Jones provided a hard copy list of discharged employees over the age of 50. 1 CR 116. Hood requested a list of all discharged BOAs (the same category as Hood) from 1990 to date, but on May 19, 1999, Jones informed Hood that BOA records were "not available." 1CR: 129. On May 24, 1999 Hood requested electronic or magnetic data from 1990 to present for:

> a) the ages for all employees for each year;
> b) the sexes for all employees for each year;
> c) the ages/sexes for each job classification per year;
> d) any other data regarding company employees including, age, sex, classification, hires, fires, retirements and terminations for any other reason:
>
> > 1) any analysis, assessment and/or survey made by the company regarding any of the above categories;
>
> e) company personnel/Human Resources practice and procedure manuals or any other documents which set forth the company's procedures regarding personnel including, but not limited to, hiring, firing, assessments

> of abilities, annual review and prevention of age discrimination.
> 1 CR 122.

On July 19, 1999 Jones objected to Hood's May 24, 1999 request for a list of discharged employees from 1990 to the present stating:

> Objection on the basis that the request is unduly burdensome and harassing. Defendants provided this information to Plaintiff on hard copy. Edward D. Jones & Co. has one large mainframe which includes all of its proprietary information, nationwide. Edward D. Jones & Co. does not have the capability to make a disk from any of its software system information. Subject to the above objection, none.
>
> None of the categories listed in Request for Production No. 1 above are available in electronic or magnetic data form.
> 1 CR 128.

Despite this objection, on November 12, 1999 Jones emailed Hood a list of all employees discharged over the age of 50 from 1990 to date (response to Interrogatory No. 10). 1 CR 119-121.

On June 8, 2000 Jones objected to Hood's May 19, 2000 request for production requesting a list of all discharged employees from 1990 to the

present on the basis that the request was overbroad, burdensome and harassing and requested information not relevant to the case. 1 CR 132.

On July 7, 2000 Hood filed a Motion to Compel Discovery regarding Jones' failure to provide a list of employees discharged by Jones since 1990 to the present:

> Jones has provided by e-mail to Hood a list of persons over the age of 50, but Hood needs Jones' information on discharged employees under the age of 50 to determine a statistical profile. Hood had offered to receive the information only on BOA's (Hood's job) but Jones said this information was unavailable. Then, Hood sought the list of all terminated employees since 1990 to which Jones has objected. Since Jones' home office was involved in the termination of Hood, statistical information is needed to show Jones' alleged reason for termination was pretextual and to rebut Jones' case. Moreover, the information Hood seeks must be readily available to Jones since Jones was able to provide a computer generated list by e-mail of all discharged employees over the age of 50. (See Exhibit "B3").
>
> The purpose of the above information is to determine whether Jones discharges or terminates employees over 40 at a greater rate than persons under 40. This evidence is necessary in a discrimination suit to rebut

> Jones' claim that Hood was discharged for non-discriminatory reasons. See, *Deloach v. Delchamps, Inc.*, 897 F2nd 815, 820 (5th Cir. 1990).
> 1 CR 85.

On September 12, 2000 Jones and Rogers filed a Response to Plaintiff's Motion to Compel Discovery stating:

> The information Plaintiff intends to obtain as a result of the documents requested would fail to meet the requirements discussed in the proceeding paragraph. At most, the statistical information requested by Plaintiff would show a "disparate impact," which would not meet the burden required for Plaintiff to prove intentional discrimination. *Mullins v. Raytheon Co.*, 164 F.3rd 696,700-701 (1st Cir. 1999). More importantly, Plaintiff's claim cannot be grounded solely on a theory of "disparate impact." *Id.* Therefore, even if Defendants could produce the requested documentation, the information provided to Plaintiff would have no legal impact on the presentation of their case. Specifically, the information would not create a genuine issue of material fact as to Defendants' pending Motion for Summary Judgment (the only purpose of the request would be to overwhelm the Court with documentation in attempts to distract the Court from the issues relevant to Defendants' pending Motion for Summary Judgment).
> 1 CR 136-137.

On November 6, 2000 Jones' attorney Michael McCauley wrote a letter to Judge Rex in response to Plaintiff's Motion to Compel Discovery stating that the cost of providing the records of discharged employees would be burdensome and too expensive as it would produce "over 9,000 pages of documents" and "would cost over $12,365.00". 1 CR 139.

On June 16, 2005 Hood filed an Amended Motion to Compel Discovery quoting *Smith v. City of Jackson,* 544 U.S. 228 (2005), which held that disparate impact theories are applicable in claims for age discrimination. Therefore discovery of statistical information of Jones termination of employees older than 50 years of age was required. 1 CR 226. On October 24, 2006 the Trial Court, on its own insistence, only requested Jones to provide Hood with the list of employees terminated between the ages of 40 and 50. 1 RR 11.

C. Inclusion Department and Pertinence of Statistical Information

Mary Kranzberg, an employee of Jones in

their Human Resources Department, testified in her deposition on February 10, 2006 that Jones had an "inclusion" department which could analyze its own data to determine whether or not employees in protected classes were being discharged at a greater rate than other employees:

> Q. Well, I mean have you all ever done any kind of analysis just to try to make sure that you all aren't, that your numbers aren't off? In other words, to see if there may be some problem out there that's occurring that the numbers suggest but that maybe you're not aware of?
> MR. MCCAULEY: Objection. Form. If you know.
> A. No, I don't know.
> Q. I mean do you all ever do anything like that, try to look at the numbers
> MR. MCCAULEY: Objection. Form.
> Q: And see, for example, that you're not hiring enough black people or that you're firing too many black people or you're not hiring enough people over 40 or you're firing too many people over 40, have you all ever done, ever gone through those analyses?
> MR. MCCAULEY: Objection. Form.
> A. We have an inclusion department that looks at those numbers. They're responsible for insuring that the firm is, has initiatives that work in a way that insures we have an inclusive workforce.
> 3 CR 516-517.

On October 11, 2006 Hood filed a Motion to Compel Production of Documents requesting the "inclusion" department's documents to be provided to her to which Jones objected as follows:

> REQUEST FOR PRODUCTION NO. 11
> Any document reflecting if Edward D. Jones & Co., L.P. made an analysis of its workforce in whole or part over the age of forty from 1990 to the present including any analysis by the "inclusion" department referred to by Mary Kranzberg and Beth Cook in their depositions.
>
> ANSWER: Defendant objects that this request for production is overly broad, unduly harassing and oppressive, thereby causing an unnecessary expense to disclose such information and exceeding the scope of discovery pursuant to TEX. R. CIV. 192.4. Defendant further objects that this request inquiries into a matter which is not relevant to the subject matter in the pending action and further is not reasonably calculated to lead to the discovery of admissible evidence. TEX. R. CIV. P. 192.3. Defendant further objects that this request inquires into a overly broad time period which renders the information sought irrelevant to the subject matter in the pending action, and is further not reasonably calculated to lead to the discovery of admissible evidence. Lastly, Defendant objects that this request seeks discovery of matters which are beyond the scope of discovery and therefore, constitutes

> an inappropriate discovery request under the Texas Rules of Civil Procedure, including Rule 192.3.
> 5 CR 843.

Kranzberg's own trial testimony revealed the pertinence of the statistical information to the case when she stated that she did not determine who replaced Hood and admitted the fact that a 31-year-old replacing a 62-year-old could be a cause for concern of age discrimination. Neither she nor Louis Branz (an in-house attorney for Jones who filed a response with the EEOC denying age discrimination) ruled out age discrimination:

> Q: And I asked you in your deposition, I asked: Do you know who replaced Syble Hood? And what was your answer?
> A: I don't recall what my answer was.
> Q: But did you say, I don't know who, it wasn't my area of responsibility to find out who replaced her, so I didn't. Was that your answer?
> A: Correct. Correct. Yes.
> Q: And then I said: Well, then who took her job? And your answer then: I don't know. Correct.
> A: I believe that's correct.
> Q: Did you, you're saying you took Lyn Scott's age and the fact she had replaced Syble Hood into consideration?
> A: No, I didn't. No, I did not. No sir.

Q: And there's nothing in your notes or the file that show that a -- you ruled out age as the motivating factor in the case, is that correct?
A: No, that's not.
Q: Is there anything that you could show, you could show the jury that, could look at your notes and see how you ruled out age discrimination? And your answer was No.
A: That's correct.
Q: Ok. And you agree that a 62-year-old was replaced by a 31-year-old and that could be cause for concern, whether that could be age discrimination, is that correct?
A: That's correct.
Q: Did you, you're saying you took Lyn Scott's age and the fact she had replaced Syble Hood into consideration?
A: No, I didn't. No, I did not. No, sir.
Q: And there's nothing in your notes or the file that show that a -- you ruled out age as the motivating factor in this case, is that correct?
A: No, that's not.
Q: Now you're not familiar whether or not Mr. Louis Brantz did anything to try to rule out age discrimination as a factor in this case, did you?
A: No.
5 RR 38-44.

D. Rogers' Motion for Summary Judgment

On January 5, 2006 Rogers filed a Motion for Summary Judgment, 2 CR 281, which included the

affidavits of Hood's supervisor, Robby Rogers, 2 CR 300, and Steve Rarick, 2 CR 302, an employee of Jones in their Human Resources Department. Rogers' Motion for Summary Judgment stated pertinently:

> 2. Application of law to facts
> To begin with, Plaintiff cannot prove the first element of her cause of action, that a written or oral contract existed. To the contrary, Plaintiff's employment was at will (See Exhibit "A", Rogers Aff., 1:19; See Exhibit "B", Rarick Aff., 4:2-3). Plaintiff had no contract or contractual relationship with Edward Jones. (See Exhibit "A", Roger Aff., 1:19-20; Exhibit "B", Rarick Aff., 4:3) If there is no contract, there is nothing with which to interfere. In case at bar, since Plaintiff was an employee "at will" with Edward Jones, she had no contract of employment (See Exhibit "A", Rogers Aff., 1:19-20 See Exhibit "B", Rarick Aff., 4:2-3).
>
> It is well settled that, absent a specific contractual provision to the contrary, an employer has the absolute right to terminate an employee with or without cause when employment is "at-will". *Casas v. Wornick Co.*, 818 S.W.2d 466, 469 (Tex. App. – Corpus Christi 1991, writ ref'd). "A party cannot tortiously interfere with himself. Liability must be founded upon the acts of an interfering third party." *Baker v. Welch*, 735 S.W.2d 548, 549 (Tex. App. – Houston [1st

> Dist.] 1987, writ dism'd). In other words, for liability to attach to Rogers, he would have to be acting in his individual capacity, not that as a corporate representative . *Id* . A party to a business relationship cannot tortiously interfere with himself. *Baker*, 735 S.W.2d at 549.
>
> . . .
>
> G. Summary
> Rogers had sole management control over employees at the Andrews branch. (See Exhibit "A", Rogers Aff., 1:12-14; See Exhibit "B", Rarick Aff., 3:17-22) As such, Rogers was Edward Jones' employee acting as an agent. (See Exhibit "B," Rarick Aff., 3:16-17).

This is in contrast to the 2003 decision of the U.S. District Court of Nebraska in the case of *Boyer vs. Edward Jones*, 2003 WL 25693573 (Neb.) which case was presented to the Court of Appeals post-argument. Jones did not disclose the case to Hood in any supplements to discovery responses requesting other discrimination cases. 1 CR 88, 91. There, a 32-year-old replaced 55-year-old Boyer who claimed tortious interference with her contract by the IR (investment representative). Jones did not attempt to suggest that the IR (the same position held by Mr. Rogers) had any power to terminate

employees. Jones' Mr. Rarick was also a witness there but no alter ego argument was made.

The affidavits of Rogers and Steve Rarick which were exhibits to Rogers' Motion for Summary Judgment provided pertinently:

Rogers stated in his affidavit as follows:

> As the Investment Representative, I was responsible for the management of the Andrews branch office and I was the highest ranking employee in that office. My responsibilities included human resource decision making, including hiring and terminating of personnel and evaluations of employee work performance for employees under my supervision through ratification of Human Resources of Edward Jones.
>
> On May 1, 1998, due to her failure to improve her job performance, as part of my job responsibilities for Edward Jones, I terminated Ms. Hood for insubordination, poor work performance, failure to perform order tasks and absenteeism, which was ratified by Mare [*sic*] Kranzberg in Human Resources at Edward Jones.
> 2 CR 300.

Steve Rarick stated in his affidavit pertinently:

> Rogers acted for Edward Jones as its agent in his capacity of Investment Representative. As the Investment Representative, Rogers was

> responsible for managing the branch office and was the highest ranking employee in that office. Rogers responsibilities included human resource decision-making, which included hiring and firing of personnel and evaluations of employee work performance for employees under his supervision. Rogers was responsible for making all personnel decisions related to employees at the Andrews Branch office of Edward Jones.
> 2 CR 302.

On February 16, 2006 Kranzberg, in her deposition, stated that Rogers could not fire Hood without the permission of Jones:

> We do not allow them to terminate individuals. We must validate what the situation is. I validated it was her performance.
> 3 CR 507.

Further, in her office notes she described how Rogers could not do anything illegal or unethical:

> 05/06/97 Rob and I discussed the progressive discipline process and he believes that the performance review services or verbal warning with an expected improvement time frame of six months. I encouraged him to document, print vi, boa, (sic). Profile and vi, boa (sic) checklists. I explained that HR would help him with the process and write a written warning.

> 04/02/98 I will write a final written warning with the information Robby sends me provided it is warranted. I will determine the nature and content of the warning and get in touch with Robby.
>
> 04/20/98 Today Robby and I served a final written warning to Syble. I place (sic) a conference call to Syble and Robby to discuss the final written warning. I explained that we would allow each and every IR to practice their own management style, as long as it is not illegal and unethical.
> 3 CR 459, 466-467.

On February 22, 2006 Hood filed a response to Rogers Motion for Summary Judgment, 2 CR 380, which included an affidavit by Hood:

> After six years of favorable annual performance evaluations, I received my first poor performance review in April, 1997. The review stated I 'needed improvement' in the areas of 'customer service' and 'interpersonal skills', 'meets expectations' in 'office administration and marketing support' and 'exceeds expectations' in 'personal development'. Also, in April, 1997, for the first time in my career, there was also a home office evaluation of our office. I turned 62 on June 7, 1997. After the review, I was not informed by that person that my performance was inadequate nor did I receive from her or the home office any written evaluations or criticisms.

From this 1997 evaluation to my termination in May, 1998, my relationship with Mr. Rogers at work was a nightmare. Robby was not easy to approach on any matter on which I needed his expertise. He was discourteous, rude, overly critical and arrogant. One time he acted this way when a customer was present which was uncomfortable to both me and the customer. He would come into my office and just stare at me. In June, 1997, I began having outbreaks of rashes and started losing weight. My review on April 20, 1998, was perfunctory and was followed by my termination on May 1, 1998. The criticisms of my work were unsubstantiated and a pretext to either drive me off or terminate me. Lyn Scott, the other BOA, received preferences I did not receive including being allowed to study while at work, taking off to pick her children up from school, taking off for hair appointments and spring break.

The last two employees hired by Mr. Rogers had very little background work or experience for the positions they filled. Lyn Scott told me she worked part-time for a veterinarian in high school until she dropped out. She did get her GED and worked for a hospital in Midland as a file clerk. Approximately two weeks prior to my termination, a student, Casey Silva, was hired on a part-time basis. This student stayed until early September, 1998 at which time another young lady by the name of Tammie Ashabranner, who was in her early

> 30's, was employed and remains so at the present time. Tammie and Lyn were friends to the extent they alternated care of their children between their respective jobs. At the time she was hired, I believe Tammie was a cook at Permian General Hospital. Thus, there were two full-time employees at Edward D. Jones on the date of my termination and there are two full-time employees today. Neither person is over 40 years of age.
> 2 CR 450-451.

On February 24, 2006 Hood filed an Objection and Motion to Strike Portions of Affidavits of Robby Rogers and Steve Rarick and a Motion for Continuance and/or Motion to Allow Supplemental Response to Motion for Summary Judgment, 3 CR 458, and a Motion for Continuance and/or Motion to Allow Supplemental Response to Motion for Summary Judgment 3 CR 468.

On February 28, 2006, the day of the hearing on Rogers' Motion for Summary Judgment, 3 RR 2, Hood filed a Supplement to Motion for Continuance and/or Motion to Allow Supplemental Response to Motion for Summary Judgment containing the deposition of Mary Kranzberg and a Brief in Support of Response to Pleas to the Jurisdiction and

Motion for Summary Judgment, arguing that the affidavit of Rogers stated that Hood was an "at will" employee, but the testimony from Mary Kranzberg in her deposition stated that Rogers had to have the permission of Jones to fire Hood. 3 CR 489, 525.

On October 24, 2006 Rogers testified pertinently at trial:

> Page 14, Lines 4-25:
> Q: (BY MR. WHITESIDE): Now to be able terminate an employee with Edward Jones, again, I guess we just touched upon this, but you had to have permission from the home Office to terminate somebody, correct?
> A. And documentation.
> Q. And documentation. In other words, we, have you ever heard of the term "at will" contracts? I mean if you have, just nod.
> A. Yes .
> Q. Okay. And are you – could you terminate anybody for any reason at Edward Jones?
> A. Could you repeat the question?
> Q. Could you terminate any employee at Edward Jones for any reason?
> A. For any reason that was documented properly and was within the confines of the law.
> Q. No. I'm saying for any reason. Could you say, I don't like that person, could you terminate an employee because you didn't like them?
> A. Not without proper documentation.
> Q. And this proper documentation is what? In

> other words, that is your reporting to Edward Jones about deficiencies or problems or something like that with the employee?
>
> Page 15, Lines 1-2:
> A. There's a protocol and a process in place through the Human Resources.
> Partial RR 14-15.

E. Hood's Motion for Sanctions

On October 26, 2006 the Jury answered the Court's Charge to the Jury in favor of the Defendant. 5 CR 984. On October 27, 2006 Hood filed her Motion for Relief Under TRCP 13 and 166a(h) stating pertinently:

> As shown by the testimony at trial of Rogers and Mary Kranzberg, these affidavits were false and a violation of TRCP 13 and TRCP 166a(h) and the allegations in said pleadings were a violation of TRCP 13 entitling Hood to appropriate sanctions, attorney fees and expenses. 6 CR 992.

On November 27, 2006 Jones and Rogers filed their Response to Plaintiff's Motion for Relief Under TRCP 13 and166a(h). 6 CR 1047. On November 30, 2006 Hood served a Subpoena Duces Tecum on Robby R. Rogers, R. Michael McCauley, Timothy T. Pridmore, and McWhorter, Cobb & Johnson, the attorneys and law firm representing Jones and

Rogers, requesting the following documents and identities:

> Matters on Which Examination Requested:
> To testify and/or produce the DOCUMENTS requested including who participated in any way in drafting and/or making revisions to Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as Exhibit A and B thereto including, but not limited to, faxing, mailing or emailing of the drafts of the same or the final drafts of the motion and affidavits between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P., Kimber Monroe, and/or the Edward D. Jones' legal department, Steve Rarick and Robby R. Rogers or any other person or entity, their representatives, agents, servants and employees.
>
> Documents to Produce:
> Any DOCUMENTS in your "POSSESSION, CUSTODY, OR CONTROL" which reflect the IDENTITY of all persons or entities who participated in any way in drafting and/or making revisions to Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as Exhibit A and B thereto including, but not limited to, faxing, mailing or emailing of the drafts of the same or the

> final drafts of the motion and affidavits between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P., Kimber Monroe, and/or the Edward D. Jones' legal department, Steve Rarick and Robby R. Rogers or any other person or entity, their representatives, agents, servants and employees.
> 6 CR 1076.

On December 1, 2006 Hood filed a First Supplement to Motion for Relief Under TRCP 13 and TRCP 166a(h) stating pertinently:

> ... These affidavits, and the pleadings which relied on them, were not the result of mere bad judgment and negligence, but were consciously drafted and executed by EDWARD JONES and ROGERS to secure action by this Court to dismiss claims against ROGERS knowing full well that the statements were false. See *Appleton v. Appleton*, 76 S.W.3d 78, 86-87 (Tex. App. – Houston (14th Dist.) 2002). ROGERS did not have "sole management control over the employees at the Andrews branch." ...This Court should strike EDWARD JONES' and ROGERS' answers, disregard the jury verdict and set the case for trial and determination of Plaintiff's actual and punitive damages, attorney fees and costs. These sanctions should be imposed on the parties for their knowing complicity in the execution of the pleadings and drafting of the affidavits. *TransAmerican Nat. Gas Corp. v. Powell*, 811

> S.W.2d 913, 917 (Tex. 1991). Here death penalty sanctions should be imposed since lesser sanctions are insufficient to deter this type of egregious conduct which conduct justifies the presumption that EDWARD JONES and ROGERS defenses lack merit. See *Cire v. Cummings*, 134 S.W.3d 835,842 (Tex. 2004); see also *GTE Communications Systems Corp. v. Tanner*, 856 S.W.2d 725, 729-730 (Tex. 1993).
> 6 CR 1051.

Hood filed Plaintiff's Fifth Request for Production on January 8, 2007 requesting the following:

> REQUEST FOR PRODUCTION NO. 1
> Any documents in your "POSSESSION, CUSTODY, OR CONTROL" which reflect the IDENTITY of all persons or entities who participated in any way in drafting and/or making revisions to and final approval of Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as Exhibit A and B thereto including, but not limited to, faxing, mailing or emailing of the drafts of the same or the final drafts of the motion and affidavits and any discussions of and decisions made by and between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P., Kimber Monroe, and/or the Edward D. Jones' legal department, Steve

Rarick and Robby R. Rogers or any other person or entity, their representatives, agents, servants and employees.

REQUEST FOR PRODUCTION NO. 2
Any documents in your "POSSESSION, CUSTODY, OR CONTROL" which reflect all discussions of and all decisions made regarding all drafts and/or revisions and final approval for Defendant, Robby Rogers' Motion for Lack of Jurisdiction and Motion for Summary Judgment and Brief in Support Thereof dated January 4, 2006 and the affidavits of Robby R. Rogers and Steve Rarick, attached as Exhibit A and B thereto including, but not limited to, faxes, mailed documents, letters of transmittal, memos, notes, emails by and between McWhorter, Cobb & Johnson, L.L.P., Edward D. Jones & Co., L.P., Kimber Monroe, and/or the Edward D. Jones' legal department, Steve Rarick and Robby R. Rogers or any other person or entity, their representatives, agents, servants and employees.
6 CR 1079.

On January 16, 2007 Jones and Rogers responded to Hood's Fifth Request for Production as follows:

RESPONSE: Defendant objects to this request for reason that the deadline to produce and serve discovery has passed in this case. Defendant further objects to this request for the reason that it seeks discovery

> of matters protected from disclosure by the attorney-client privilege pursuant to Texas Rule of Civil Procedure 192.5 and the Texas Rule of Evidence 503. Defendant also objects to this request for the reason that it seeks discovery of matters which are beyond the scope of discovery and, therefore constitutes an inappropriate discovery request under the Texas Rules of Civil Procedure, including Rule 192.3.
> 6 CR 1083.

On January 22, 2007 Hood filed a Motion to Compel Production of Documents and Motion to Submit Documents *In Camera* regarding the documents requested in Hood's Fifth Request for Production. 6 CR 1071.

On February 13, 2007 Hood served a Subpoena Duces Tecum on Robby R. Rogers, R. Michael McCauley, attorney for Jones and Rogers, Timothy T. Pridmore, attorney for Jones and Rogers & McWhorter, Cobb & Johnson, the law firm representing Jones and Rogers requesting the documents that had been requested in the January 8, 2007 Request for Production.

Also on February 13, 2007 Jones and Rogers filed a Motion to Quash Plaintiff's Subpoena Duces Tecum stating pertinently:

OBJECTION: Movants object to this request for the reason that the deadline to produce and serve discovery have [*sic*] long since passed in this case. Movants further object that the request is vague, overly broad and unduly burdensome. Movants further object to the extent that the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties [*sic*] resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving disputed issues of material fact. TEX.R.CIV.P. 192.4(b). Movants further object to the extent that the instant request is made solely for the purposes of harassment. Movants further object to the extent that this request constitutes an impermissible "fishing expedition."

PRIVILEGE: Movants are of the opinion that as the matters upon which discovery is sought concern communications between Defendants and their lawyers regarding the subject matter of the litigation, no withholding statement is required pursuant to the TEX.R.CIV.P. 193.3(c). Nevertheless, in an abundance of caution, Movants object to this request for the reason that it seeks discovery of matters protected from disclosure by the core work product, other work product, and attorney-client privileges pursuant to Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. Accordingly, responsive information and/or materials have been

withheld on that basis.
6 CR 1107.

On February 14, 2007 Jones and Rogers filed a Response in Opposition to Plaintiff's Motion to Compel and Motion to Submit Documents *In Camera* and Defendants' Motion for Protection Order and Request for Expenses Pursuant to Texas Rule of Civil Procedure 215.1(d), 6 CR 1116, in response to a request for documents in Plaintiff's Fifth Request for Production stating pertinently:

> RESPONSE: Defendant objects to this request for reason that the deadline to produce and serve discovery has passed in this case. Defendant further objects to this request for the reason that it seeks discovery of matters protected from disclosure by the attorney-client privilege pursuant to Texas Rule of Civil Procedure 192.5 and the Texas Rule of Evidence 503. Defendant also objects to this request for the reason that it seeks discovery of matters which are beyond the scope of discovery and, therefore constitutes an inappropriate discovery request under the Texas Rules of Civil Procedure, including Rule 192.3.
> 6 CR 1079.

On February 21, 2007 Jones and Rogers filed their Response to Plaintiff's Motion for a New Trial stating pertinently:

> Even assuming, solely for the sake of argument, Plaintiff is correct and the testimony is "inconsistent," Plaintiff has failed to explain what *legal* ramifications the residual exercise of oversight through the ratification of Rogers employment decisions has for this case. Certainly, Defendants know of no such implications, considering that *a jury of Ms. Hood's peers unanimously found that age was not a motivating factor in her termination.*
> 6 CR 1139.

On February 22, 2007 the Trial Court signed an Order Denying Plaintiff's Motion to Compel Production of Documents and Motion to Submit Documents *In Camera,* 6 CR 1145, and an Order Granting Edward D. Jones & Co., L.P., Robby R. Rogers, Timothy T. Pridmore, R. Michael McCauley, Jr., and McWhorter, Cobb & Johnson, L.L.P.'s Motion to Quash Plaintiff's Subpoena Duces Tecum.

F. Hood's Mandamus to the Court of Appeals and Texas Supreme Court

On March 10, 2007 Hood sought mandamus from the Eighth Court of Appeals for the Trial Court's refusal to examine the documents *in camera,* 6 CR 1150-1151. Relief was denied on March 22,

2007. App. C.

On March 29, 2007 Hood filed a substantially identical Petition for Writ of Mandamus with the Supreme Court of Texas. On April 4, 2007 Hood filed a Notice of Appeal. 6 CR 1152. On June 1, 2007 The Supreme Court of Texas denied Hood's Petition for Writ of Mandamus. App. D. On June 21, 2007 Hood filed a Motion for Rehearing with the Texas Supreme Court on the Petition for Writ of Mandamus. On July 27, 2007 the Supreme Court denied Hood's Motion for Rehearing. App. E.

G. Trial Court Order Denying Hood's Motion for Sanctions and Granting Jones' Motion for Sanctions and Hood's Objection

On October 23, 2007, after a hearing, the Trial Court signed an order denying Hood's Motion for Sanctions and awarded attorney fees of $3,000 and expenses of $258.31 to Jones. 2nd Supp. CR 1. App. F.

H. Court of Appeals Decisions

The Court of Appeals in two opinions issued simultaneously affirmed. In 08-07-00324 the Court

noted that since there was no evidence to support Hood's motion for sanctions there was no abuse of discretion. The court likewise affirmed the award of attorney fees and expenses to Jones against Whiteside, relying only on TRCP 215.1(d). In 08-07-0093, the Court affirmed the trial court's granting of summary judgment to Rogers regarding the tortious interference claim on the basis that since he acted "within the scope of employment as a 'corporate representative' he cannot tortiously interfere with a contract between his employer and an individual or entity." App. H. This is the "alter ego" theory of *Baker v. Welch* 735 S.W.2d 548, 549 (Tex. App.-Houston (1st Dist) 1987, writ. dism'd.) cited by Jones in its summary judgment brief and *Gonzalez v. Gutierrez,* 694 SW2d 384, 388-89 (Tex. App.-San Antonio 1985, no writ.) cited by the Court of Appeals. The court then turned to the issues of denial of statistical data and Hood's request for sanctions. The Court criticized Hood's "failure to detail the statistical analysis of the data she had already obtained" (terminations of employees over 50). App. H. The Court found no abuse of discretion and refused to engage in "wild speculation

as to what the documents produced actually showed or that additional discovery was necessary." App. H.

The Court affirmed the denial of Hood's request for an *in camera* review of Jones' documents which were allegedly protected by attorney-client privileges and not produced. The court found that there was no more than a "minor discrepancy" between the affidavits and trial testimony. App. H. Moreover, the Court held that the Rule "is not served by allowing Hood to peruse the attorneys' files in a fishing expedition launched the day the jury returned a vote against her." App. H. The Motion for Rehearing was denied. App. J.

REASONS FOR GRANTING THE PETITION

I. Recent Decisions of the El Paso Court of Appeals and the Texas Supreme Court highlight the dual system of justice that exists in Texas.

The Texas court system's (trial court, court of appeals and supreme court) refusal to grant Hood's well-founded request for age discrimination statistical data and Jones' own "inclusion

department" analysis of its workforce, and, most significantly, *in camera* review of Jones' withheld documents, is emblematic of Texas' ultraconservative shift away from individual rights. This shift is evident when contrasted with the Texas Supreme Court's recent decision in April in *Ford Motor Company v. Castillo,* 279 S.W. 3d 656 (Tex 2009) and the El Paso Court of Appeals June decision *In re Small,* 2009 WL 1620436 (Tex.App.–El Paso). In *Small,* the Court of Appeals carefully outlined the crime-fraud exception for the attorney-client privilege but found the Plaintiff failed to establish a *prima facie* case of contemplated fraud since no under the following rules:

> To establish a privilege, a party must plead the particular privilege, produce evidence to support the privilege through affidavits or testimony, and produce the documents themselves if the trial court determines an *in camera* review is necessary. *See* Tex.R.Civ.P. 193.3(a); *Peeples v. Hon. Fourth Supreme Judicial Dist.,* 701 S.W.2d 635, 637 (Tex. 1985) (orig. proceeding). Once the party resisting discovery establishes a *prima facie* case that the documents are privileged, the burden shifts to the discovering party to refute the privilege claim. *See Marathon Oil Co. v. Moye,* 893 S.W.2d 585, 591 (Tex.App.-Dallas 1994, orig. proceeding).

. . .

Texas Rule of Evidence 503(d)(1) provides that material otherwise protected by the attorney-client privilege is discoverable if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud. *See* Tex.R.Evid. 503(d)(1); *In re Seigel,* 198 S.W.3d at 28. The crime fraud exception only applies if: (1) the party asserting the exception establishes a *prima facie* case of contemplated fraud; and (2) there is a relationship between the document for which the privilege is challenged and the *prima facie* proof offered. *In re Seigel,* 198 S.W.3d at 28.

The *prima facie* requirement is met when the proponent offers evidence establishing the elements of fraud and that the fraud was ongoing, or about to be committed at the time the document was prepared. *Id.* Mere allegations of fraud are not sufficient. *Id.* Similarly, the fact that the plaintiff's cause of action involves fraudulent conduct is also insufficient. *Id.* The fraud alleged to have occurred must have happened at or during the time the document was prepared, and the document must have been created as part of perpetrating the fraud. *Id.* at 28-9. The trial court must make findings both that the *prima facie* case has been established and that a nexus exists between the document at

issue and the alleged fraud. *Id.* at 29.

While demonstrating in *In re Small* a keen awareness of the exception and the in camera procedures, the same panel of the Court of Appeals in Hood slightly over four months earlier made no mention of the crime-fraud exception, much less that Hood was precluded from making a *prima facie* case showing the "relationship between the document . . . and the *prima facie* proof" since no documents were tendered *in camera* for the trial and appellate court to review. Instead, the Court simply dismissed the claim concluding that there was no more than a "minor discrepancy" between the affidavits and trial testimony and Hood wanted to conduct a "fishing expedition" into Jones' attorney files. Did the Court avoid the analysis it properly applied *In re Small* to obtain a different result?

In *Ford,* while the jury was deliberating this products liability case, the presiding juror sent a note asking what the maximum amount was that could be awarded. Unsurprisingly the case promptly settled. However, after the jurors were dismissed, Ford interviewed the jurors and learned that they had found in favor of Ford on one issue and were

deliberating the second when the presiding juror sent the note without the knowledge of some jurors and over the objection of others. Ford asked to delay settlement to allow it or the court to take discovery from the jurors. The motion was denied. Ford lost in the court of appeals but the Texas Supreme Court reversed holding that:

- parties are "entitled to full fair discovery and to have their cases decided on the merits" *Id.* at 663
- "only in certain narrow circumstances is it appropriate to obstruct the search for truth by denying discovery" *Id.*
- "a trial court abuses its discretion when it denies discovery going to the heart of the party's case"
- Castillo's argument that Ford's request for discovery was after the agreed discovery deadlines is inappropriate since Ford's cause of action arose subsequent to the deadlines
- "the trial court's preemptive denial of discovery could have been proper only if there existed no possible relevant discoverable testimony, fact, or material to support or lead to evidence that would support a defense to Castillo's claim for

breach of contract" Id. at

- while Castillo complained that under accepted law Ford's suspicion it "might" uncover relevant evidence is insufficient; the facts here were not "sufficiently developed" nor was "all the relevant information at hand ..."
- error is harmful and appealable "when discovery is denied and because of the denial the evidence sought does not appear in the record, determining harm from the denial is impossible and the party is prevented from properly presenting its case on appeal."

Id.

Applying the *Ford* analysis to Hood should also have led to a different result. Hood and Whiteside were entitled to full, fair discovery in their search for the truth and to have their case decided on the merits. Discovery of Jones' employment statistics and "inclusion" department analyses and Jones' and its attorneys decisions to use seemingly fraudulent affidavits goes to the heart of the matter and prevents Hood and Whiteside from properly presenting their case on appeal. Hood's sanction claim did not arise until trial when

the discovery deadlines were closed. Rogers, who was not deposed prior to trial, testified, in contradiction to his affidavit, that he did not have the power to terminate Hood without following human resources' guidelines and obtaining their approval. The Court of Appeals did not have to engage in "wild speculation" to learn that Hood had been given no meaningful statistical information as to Jones' workforce during Hood's employment. Moreover, Hood was not engaged in a "fishing expedition" but only sought Jones' withheld documents be examined *in camera* to show whether Jones knew its summary judgment affidavits were false. Certainly an individual plaintiff in Texas is entitled to the same Due Process afforded a corporate defendant.

II. Funding for the Texas Supreme Court has led to preferential treatment for donors.

Finding the answer to these conflicting results can be found in the political makeup of the Texas Supreme Court. The Texas Supreme Court has become significantly one-sided twice in recent memory - the mid 1980s and currently. In 1987, 60

Minutes aired an episode on the Court, "Justice for Sale". At that time the Court had become exceedingly liberal, allegedly due to donations from trial lawyers and litigants.[1] More recently the Court has become very conservative. Currently all nine justices are Republicans, most having been appointed by the Republican Texas governor.[2] In the past, all justices were listed as Democrats,[2] although that was not necessarily indicative of their liberalism. Being a Republican did not become fashionable until the nineties. In both instances of the Court's departure from evenhanded justice, blame was placed on campaign financing.[3] Between

---

1 See, e.g., Champagne, *The Selection and Retention of Judges in Texas*, 40 SWLJ 53, 84 (1986); Editorial in Texas, *Contempt of Court*, New York Times, November 5, 1987, at A34; *Quality of Justice: Texan Case Spotlights Question on Integrity of the Courts in Texas*. Wall Street Journal, November 4, 1987, at 1.

2 *Line of Succession of Supreme Court of Texas Justices from 1945: The Modern Court* (2009), http://www.supreme.courts.state.tx.us/court/sc-justices-1945-present-111406.pdf

3 *A Decade of Watching and Waiting: The Texas Supreme Court in Review 2005-2006,* Texas Watch Foundation, March 2007; Column, *Texas Justice for Sale? Judge for Yourself,* Houston Chronicle, Sept. 13, 1992, Outlook at 2; Court Watch, *The Food Chain: Winners and Losers in the Texas Supreme Court 1995-99*, at Chart 1 (May 1999); Editorial, *Texas Supreme Court Judges Should Disclose Votes. Senator Kirk Watson's Bill Would Reveal Justices' Votes on Petitions,* Austin American Statesmen, May 5, 2009; *Interested Parties: Who Bankrolled Texas' High-Court Justices in 2008?,* Texans for Public Justice, October 2009; *No End in Sight: Texas Supreme Court Maintains its Longstanding Tradition of Pro Defendant Bias 2006-2007,* Texas Watch Foundation Annual Report, August 27, 2008; *PAC*

1996 and 2008, Texas Court Watch has tracked the Plaintiff-Defendant wins showing a widening margin in the Defendant's favor since 2000-2001 with Plaintiff wins of 14% in 2006-2007 and 23% in 2007-2008.[4]

What this win-loss ratio does not reflect are the greater majority of cases, such as this one, decided by one of the fourteen Court of Appeals and denied review by the Supreme Court without opinion. The Court hears about 11% of the appeals it receives.[5]

---

for Texas Doctors Gives to Court Hopefuls, Beaumont Enterprise, Oct. 14, 1988; *Shifting Sands for Consumers: Increased Control by Activists, Defection of Moderates Leaves Consumers Looking for Relief*, Texas Watch Foundation 2002-2003; Texas Watch Foundation, *Justice for Sale in Texas?*, KHOU (Houston, Texas), May 13, 2008; *The Texas Supreme Court by the Numbers: A Statistical Analysis of the Texas Supreme Court 2005-2006*, Texas Watch Foundation 2007

4 *Shining a Light: The Texas Supreme Court's Annual Report 2007-2008*, Texas Watch Foundation, 2009

5 Texans for Public Justice, *Courtroom Contributions Stain Supreme Court Campaigns*, (2008),

Interestingly, two of Texas' "watchdog" foundations appear to reflect the liberal or conservative bias of their benefactors. The Texans for Lawsuit Reform, in an article from November 2006, reported that Texans for Public Justice were funded by plaintiffs' lawyers.[6] In turn, Texans for Lawsuit Reform is apparently funded by the construction industry.[7]

III. *Caperton vs. A.T. Massey Coal, Inc.*, 556 US ___, 129 S.Ct. 2252 (2009) reaffirms that justice is not for sale.

Texas courts cannot charge admission for Due Process; Hood is entitled to the same meaningful opportunity to be heard accorded other litigants or their representatives who have funded judicial campaigns. This Court in *Marshall vs. Jerrico*, 446 US 238, 242 (1980) held:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.

---

http://info.tpj.org/reports/courtroomcontributions/courtroomcontributions.pdf

6 *Texans for Public Justice Funded By Trial Lawyers*, TLR Press Release, November 2, 2006

7 *Leadership* (2006), http://www.tortreform.com/leaders

. . .

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Matthews v. Eldridge, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Texas courts' predisposition to apply its laws only in favor of defendants deprives Hood and Whiteside of Due Process.

CONCLUSION

For foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

TOM H. WHITESIDE
WHITESIDE LAW FIRM
P.O. Box 2825
Lubbock, Texas 79408-2825
(806) 687-9009

Counsel for Petitioners

October 21, 2009